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19-P-1082

Appeals Court

NEWTON CENTRE REALTY, INC.<sup>1</sup> vs. DAVID R. JAFFE, personal representative.<sup>2</sup>

No. 19-P-1082.

Middlesex. March 3, 2020. - June 23, 2020.

Present: Wolohojian, Massing, & Wendlandt, JJ.

Broker, Commission. Contract, With broker, Termination.  
Agency, Agent's contract, Termination. Executor and  
Administrator, Contracts, Real estate of decedent. Real  
Property, Sale. Sale, Real estate.

Civil action commenced in the Superior Court Department on September 5, 2018.

A motion to dismiss was heard by Christopher K. Barry-Smith, J.

Scott C. Gladstone for the plaintiff.  
Michael W. Wiggins for the defendant.

MASSING, J. The owner of three residential properties, Shirley A. Jaffe, died some months after entering into exclusive

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<sup>1</sup> Doing business as Centre Realty Group.

<sup>2</sup> Of the estate of Shirley A. Jaffe.

right-to-sell agreements with the plaintiff real estate agency, Newton Centre Realty, Inc., doing business as Centre Realty Group (broker). The personal representative of the estate, Shirley's son David R. Jaffe,<sup>3</sup> the defendant, sold the properties independently of Shirley's broker but within the exclusivity period. The broker sued for the commission it alleged it was owed under the exclusive right-to-sell agreements. This appeal from the dismissal of the broker's complaint turns on whether the agreements survived Shirley's death. Concluding, as did the motion judge, that under well-settled common-law principles of agency the seller's death terminated the brokerage agreements, we affirm.

Background.<sup>4</sup> In 2017, Shirley, as seller, entered into three "exclusive right to sell" agreements with respect to two residential properties in Brookline and one in Newton. The agreements, on standard Greater Boston Real Estate Board forms, named Centre Realty Group as broker and John Saleh as designated agent. Under each agreement, the broker was entitled to a four-percent commission (referred to as "a fee for professional services") under any of three conditions: (1) if the broker

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<sup>3</sup> For clarity, we will refer to the Jaffes by their first names.

<sup>4</sup> The facts, which are taken from the allegations in the broker's complaint, are not disputed.

procured a ready, willing, and able buyer on terms acceptable to the seller; (2) if the subject property was sold through anyone's efforts, including the seller's; or (3) if the property was sold within ninety days after the term of the agreement to anyone the broker introduced to the property during the term of the agreement. The term of all three agreements lasted through August 31, 2018.

Shirley died on November 18, 2017, and David was appointed personal representative of her estate. On June 26, 2018, deeds were recorded in the Norfolk County registry of deeds reflecting the sale of the two Brookline properties for \$1,935,000 and \$2,555,000. On August 21, 2018, a deed of sale for the Newton property in the amount of \$1,200,000 was recorded in the Middlesex South registry of deeds. The properties were all sold during the exclusivity period of the agreements.

The broker promptly filed a complaint in the Superior Court, suing David, in his capacity as the personal representative of Shirley's estate, for breach of contract and unjust enrichment. The broker sought to recover its commission, four percent of the sales price of the three properties, totaling \$227,400. In response, David filed a motion to dismiss under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). Finding no breach of contract, because the agreements created an agency relationship that terminated upon Shirley's death, and no

unjust enrichment, because the broker did not allege that it conferred any benefit in connection with the sale of the properties, a Superior Court judge allowed the motion to dismiss. On appeal, the broker contests only the dismissal of the breach of contract claim.

Discussion. Whether the death of the seller terminates a real estate brokerage agreement is a question of first impression in Massachusetts. Because the resolution of this case turns on a question of law decided on a motion to dismiss, our review is de novo. See A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 424 (2018).

"The concept of agency, as defined by the common law, acknowledges a consensual relationship between parties, in which one party acts as a representative or on behalf of the other party with power to effect the legal rights and duties of that other party." Bailey v. Astra Tech, Inc., 84 Mass. App. Ct. 590, 596 n.14 (2013). Generally, the death of the principal automatically terminates the actual and apparent authority of the agent "because it negates the existence of the person on whose behalf the agent acts." Restatement (Third) of Agency § 3.07 comment d (2006). See Roberts v. Roberts, 419 Mass. 685, 688 (1995); Gallup v. Barton, 313 Mass. 379, 382 (1943). One recognized exception to this rule is when the agency is coupled with an interest in the property. See Varnum v. Meserve, 8

Allen 158, 159 (1864); Bailey, supra at 599. See also Crowe v. Trickey, 204 U.S. 228, 240 (1907) ("The deaths of [the principals] terminated the authority of [the agent] to sell on commission, which was not a power coupled with an interest, that is, an interest in the property on which the power was to operate").

Courts in other States have applied this rule in the specific context at issue in this case. They uniformly hold that a real estate listing agreement creates an agency relationship between the broker and the property owner. See Charles B. Webster Real Estate v. Rickard, 21 Cal. App. 3d 612, 614 (1971); Smith v. H.C. Bailey Cos., 477 So. 2d 224, 235 (Miss. 1985). See also Vallis v. Rimer, 335 Mass. 528, 532 (1957) ("A real estate broker is normally not a general agent, but is usually a special agent of restricted authority"). Because of the personal and fiduciary character of the principal-agent relationship, the death of the seller terminates the agency relationship between the seller and real estate agent. "Death terminates the agency by operation of law, and the authority of the broker to represent the owner in seeking a buyer for the property is ended." Charles B. Webster Real Estate, supra at 616. Accord Thorton v. Lewis, 106 Ga. App. 328, 332 (1962); W.B. Martin & Son v. Lamkin, 188 Ill. App. 431, 436-437 (1914); Smith, supra at 235-236; Kyle v. Gaff, 105 Mo.

App. 672, 675-676 (1904); In re Ward's Estate, 47 N.M. 55, 57-58 (1943). These courts also hold that a real estate brokerage agreement does not create an interest in property and, accordingly, does not survive the principal's death under the exception for an agency power coupled with such an interest. See Charles B. Webster Real Estate, supra at 615-617; W.B. Martin & Son, supra at 434-436; In re Ward's Estate, supra at 58.

Here, the broker erroneously seeks refuge from the general rule by arguing that the decision in Brown v. Cushman, 173 Mass. 368 (1899), created two different classes of principal-agent contracts: those that rely on the personal performance or skill of the agent, which are "dissolved by death or disability, which makes the personal performance impossible," id. at 371, and those that do not and, therefore, survive. To situate the broker-seller relationship in the second category, the broker further argues that Shirley's agreement with the broker was "in no way dependent on any of [the designated agent's] particularized skill, taste or judgment." Not only does this contention go to whether the principal-agent relationship would survive the death of the agent,<sup>5</sup> it also misreads the Brown decision.

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<sup>5</sup> The argument also overlooks the reality that the real estate broker-seller relationship is often very personal, and

In Brown, the court explained that contracts often bind the legal representatives of a deceased party; as examples, the court listed promissory notes, as well as agreements "to buy, receive, and pay for certain property at stated times"; "to build a house or a ship"; and to guarantee payments of dividends. Id. at 370. By contrast, contracts requiring personal performance "will be considered dissolved by death or disability" -- "[a] familiar illustration of such a contract is . . . an agreement to paint a picture or write a book." Id. at 371. See Treasurer & Receiver Gen. v. Sheehan, 288 Mass. 468, 471 (1934) (executors are liable on contracts broken after testator's death except where personal skill or taste is required [quotation omitted]); Stearns v. Blevins, 262 Mass. 577, 580-581 (1928) (contract for architectural services terminated upon architect's death).

The holding of Brown, however, was that notwithstanding the decedent's personal skill as the manufacturer of "Sunlight Flaked Gelatine" and the distributors' personal efforts to be used in promoting and selling the product, the agreement between the parties was not a contract for personal services, but rather "was in the nature of a contract of agency." Brown, 173 Mass. at 372. The distributors "were simply [the manufacturer's]

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that real estate listings and "for sale" signs often prominently feature the name and image of the designated agent.

agents to sell the gelatine," without any property interest in it. Id. Therefore, the "familiar law of agency that the relation ceases with the death of either party" applied. Id. Contrary to the broker's contention in this appeal, the Brown decision did not alter common law principles of agency. As in Charles B. Webster Real Estate, 21 Cal. App. 3d at 618, the broker "has failed to distinguish between contracts for personal services absent an agency relationship such as hiring another to create a work of art or to construct a building or to cultivate land, and employment contracts whereby the employee is authorized to deal on behalf of the employer with third parties, which is the essence of an agency" (citations omitted).<sup>6</sup>

The agreements here created a principal-agent relationship that entitled the broker to a commission if Shirley's properties were sold within the exclusivity period. They did not confer an interest in property. Accordingly, Shirley's death terminated the agency relationship, and the broker was not entitled to recover contract damages from Shirley's estate. The Superior

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<sup>6</sup> Mills v. Smith, 193 Mass. 11, 18 (1906), which turns on the fact that the agreement between the testator and a real estate agent in Minnesota specifically provided that it was to continue in force after the death of the testator, does not assist the broker here.

Court judge properly dismissed the complaint for failure to state a claim.<sup>7</sup>

Judgment affirmed.

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<sup>7</sup> The defendant's request for appellate attorney's fees and double costs is denied.